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No. 75-382

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL ENERGY ADMINISTRATION, ET AL., PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents argue that Section 232(b) must be construed to foreclose "the imposition of fees or tariffs" (Br. 45) in order to avoid "a serious question of unconstitutional delegation of legislative power" (Br. 42). That "serious question" would arise, according to respondents, because the statutory standards governing the President's exercise of the authority conferred by Congress may be too "imprecise" (Br. 43) and too "broad" (Br. 44) to survive constitutional scrutiny.

Even if there were merit to respondents' delegation argument, it would not support their interpretation of Section 232(b). The statute itself draws no distinction between quotas and fees, and its standards are no more precise and no more confined with respect to either form of presidential action. If the delegation of authority

were constitutionally defective, the result would be that neither a quota *nor* a fee could properly be imposed by the President.

Respondents seek to avoid that result by arguing that "[t]he delegation doctrine as applied to the taxing power [in contrast to the commerce power] is particularly stringent" (Br. 44). We do not concede that Section 232 represents a delegation of the taxing power rather than the commerce power. See *Head Money Cases*, 112 U.S. 580, 595. But this Court has, in any event, already considered and rejected respondents' contention that Congress may not delegate its taxing power as freely as its commerce power.

In *Hampton & Co.* v. *United States*, 276 U.S. 394, the Court upheld the constitutionality of a provision authorizing the President to increase or decrease import duties imposed by the Tariff Act in order to equalize the differences between foreign and domestic production costs for similar articles. The petitioner, while conceding that Congress could properly delegate certain of its legislative powers to the President, argued that "this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties" (276 U.S. at 409). The Court responded, in language equally applicable to respondents' contention here, that "[t]he authorities make no such distinction" (*ibid.*). "The same principle that permits Congress to [delegate] * * * its rate making power in interstate commerce * * * justifies a similar provision for the fixing of customs duties on imported merchandise" (*ibid.*). In the exercise of either its commerce power or its taxing power, "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future

conditions, and it may leave the determination of such time to the decision of an Executive" (276 U.S. at 407). Congress may thus authorize the President "to vary the customs duties according to changing conditions" if it "shall lay down by legislative act an intelligible principle to which [the President] * * * is directed to conform" (*id.* at 409).

Section 232 satisfies that requirement. It establishes an intelligible precondition to the invocation of presidential authority—a finding that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. (Supp. IV) 1862(b). It limits the President's action to what "he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security." *Ibid.* It identifies some of the "relevant factors" to be considered by the President in determining whether imports of an article threaten to impair the national security. 19 U.S.C. (Supp. IV) 1862(c). And it prescribes a detailed procedure to be followed prior to the exercise of the President's authority, a procedure designed to ensure that appropriate executive officers (and, in some circumstances, other interested parties) have an opportunity to comment on the need for presidential action. See 19 U.S.C. (Supp. IV) 1862(b).

This is not a case in which "the Congress has declared no policy, has established no standard, has laid down no rule." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 430. While the statutory standard here may be "difficult to [apply] with exactness," the standard "is perfectly clear and perfectly intelligible." *Hampton & Co.* v. *United States*, *supra*, 276 U.S. at 404. See also *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 104-105. Respondents do not

challenge the President's findings, under the governing standard, that imports of oil were threatening to impair the national security and that the license fee system would serve to eliminate that threat (see Pet. App. 10a, 39a).

As this Court has stated, "[t]he judicial approval accorded * * * 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems"; "[n]ecessity * * * fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules * * * ." *American Power & Light Co.* v. *Securities & Exchange Commission, supra,* 329 U.S. at 105. Particularly in the area of foreign affairs and national security, where the need for flexibility in responding quickly to changing conditions is accentuated, there is no constitutional objection to a delegation of legislative authority of the kind involved here. See, *e.g., United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319-322; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-110; *Lichter* v. *United States*, 334 U.S. 742, 782, 785.[1]

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[1]The *amicus curiae*, apparently disagreeing with respondents, argues that "[t]he question raised is not whether the standards for taking any prescribed action are properly delineated, but whether the power to prescribe the form of action itself can properly be delegated to the President" (Br. 39; emphasis omitted). But we know of nothing in the Constitution or the decisions of this Court—and the *amicus* cites nothing—to support the asserted distinction. If, as the *amicus* concedes, Congress may delegate to the President the authority, under "sufficiently comprehensible standards" (Br. 38), to determine *when* to take prescribed action, there is no reason why Congress should be barred from delegating the power, under similarly comprehensible standards, to determine what *form* the action should take to accomplish the prescribed legislative objective. See *American Power & Light Co.* v. *Securities & Exchange Commission, supra,* 329 U.S. at 106.

2. Respondents argue (Br. 47-49) that the license fee system adopted by the President violates Article I, Section 8, clause 1 of the Constitution, which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." Respondents contend that the "first-tier" license fees are not uniform because the amount of petroleum that may be imported without prior payment of those fees varies among the geographical districts established by the proclamations (see A. 93-96, 103-104).

Although respondents characterize this contention as a reason for construing Section 232(b) to preclude altogether the imposition of license fees (Br. 49), the logic of their argument does not go so far. Respondents do not (and obviously could not) argue that *any* system of license fees would violate the uniformity clause of the Constitution. Nor do they complain of the *imposition* of the fees under the system adopted here. Their constitutional attack is directed to the allegedly discriminatory *exemptions* from those fees.

(a) That issue, in our view, is not properly presented in this Court. The court of appeals held that the authority conferred by Section 232(b) does not encompass the imposition of a system of license fees. Its judgments set aside the Federal Energy Administration's regulations "in accordance with the opinion of this Court" (Pet. App. 34a) and reversed the judgment of the district court and remanded "with instructions to enter appropriate relief for appellants" (Pet. App. 36a).

The nature of any further proceedings before the Federal Energy Administration, and the character of the "appropriate relief" to be entered for appellants in the district court, would be substantially altered if this Court were to rule, in line with respondents' present contention, that the license fee exemptions under the

existing system are impermissibly discriminatory. A ruling to that effect would warrant, at most, elimination of the present geographical differences in the exemptions. The court of appeals' judgments under review, by contrast, invalidate the entire license fee system.

Respondents' uniformity argument is therefore not an alternative ground for affirming the judgments below, because its acceptance would require revision of those judgments. Since respondents filed no cross-petition for a writ of certiorari, they may not now seek a modification of the judgments under review. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4. See also Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

(b) Even if the issue were properly presented, and even if the oil import license fees were viewed as "Duties, Imposts [or] Excises" within the meaning of the uniformity clause (but see *Head Money Cases, supra*, 112 U.S. at 595-596),[2] respondents' argument would fail because there is no lack of uniformity in the imposition of the fees.

No contention is made that the *supplemental* fees which have been eliminated (see our main brief, pp. 12-

[2]Of course, if, as respondents' argument on this point implies, the license fees are to be treated as "Duties," respondents' sole remedy would be to file a protest pursuant to the Tariff Act of 1930, challenging the imposition of the fee as a duty chargeable on the importation of petroleum, and to seek review of any denial of such a protest in the Customs Court. See 19 U.S.C. 1514(a)(2), 28 U.S.C. 1582(a). See also, *e.g.*, *J. C. Penney Co.* v. *United States Treasury Department*, 439 F.2d 63 (C.A. 2), certiorari denied, 404 U.S. 869. We have not, however, taken the position that the license fees are "Duties."

14)—were discriminatory, for they were applicable to *all* imports of crude oil and petroleum derivatives. Respondents argue only that the "first-tier" or base fees are assessed in a discriminatory manner because the quantitative exemptions from those fees vary among geographical districts.

The current oil import control system is a hybrid, reflecting elements both of the former quota system and of the new import license fee system. The program adopted by President Nixon in 1973 was designed to accomplish "a gradual transition from the existing quota method of adjusting imports" to "a system of fees" to be paid by oil importers for licenses authorizing them to import specified amounts of petroleum and petroleum products (A. 92). It established a gradually increasing schedule of license fees, the so-called "first-tier" fees (A. 97), and gradually decreasing quotas of imports, to be reduced to zero by 1980, that would be exempt from the imposition of those fees (A. 93-96, 103-104). Those transitional quotas differ among geographical districts in a manner that reflects the geographical quotas that had been in effect prior to the adoption of the import license fee system.

The base fees are applied uniformly to all crude oil and petroleum products imported in excess of the transitional quotas. If there is any lack of uniformity, it is in the transitional quotas, not in the fees. But, as respondents concede, "a quota may discriminate among domestic users without fear of violating the uniformity clause of the Constitution" (Br. 28), for it is not a duty, an impost, or an excise within the meaning of that clause.

The geographical quotas, moreover, would not contravene the requirement of uniformity even if it applied. When President Eisenhower established the Mandatory Oil Import Program in 1959, he found that "within the

continental United States there are two areas, one, east of the Rocky Mountains * * *, in which there is substantial oil production capacity in excess of actual production, and the other, west of the Rocky Mountains * * *, in which production is declining and in which, due to the absence of any significant inter-area flow of oil, limited imports are necessary to meet demand" (A. 81). The President accordingly determined that "imports into such areas must be treated differently to avoid discouragement of and decrease in domestic oil production, exploration and development to the detriment of the national security" (A. 81-82).

The differing quotas initially imposed in 1959 and carried forward in the present transitional program thus reflect material historical differences in the characteristics of the regions themselves. As this Court has observed, "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159.

For the reasons stated above and in our main brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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